Supreme Court, U.S.
FILED

97 1707 APR 16 1998

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NO. ____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

BERNARD F. BRADSTREET,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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6 APP

QUESTIONS PRESENTED

1. DOES A CIRCUIT COURT VIOLATE THE HOLDING OF *KOON* V. *UNITED STATES*, 518 U.S. 81, 116 S.CT. 2035, 135 L.ED.2D 392 (1996), IF IT ESTABLISHES A RULE OF LAW THAT IN A PARTICULAR CIRCUIT NO DEFENDANT WHO THE CIRCUIT COURT VIEWS AS TESTIFYING FALSELY IN DEFENDING AGAINST A CRIME OF DISHONESTY CAN EVER BE ELIGIBLE FOR A DOWNWARD DEPARTURE BASED ON ABERRANT CONDUCT?

2. DOES APPLYING SUCH A "NEW" COURT-MADE RULE TO THE CASE IN WHICH THE RULE IS ANNOUNCED VIOLATE THE DUE PROCESS EQUIVALENT OF THE *EX POST FACTO* RULE, RECOGNIZED BY THIS COURT IN *MARKS* V. *UNITED STATES*, 430 U.S. 188, 191-192, 97 S.CT. 990, 992-993, 51 L.ED.2D 260 (1977) AND *UNITED STATES* V. *LANIER*, - U.S. -, 117 S.CT. 1219, 1225, 137 L.ED.2D 432 (1997)?

3. DOES A DISTRICT COURT COMMIT "PLAIN ERROR" WITHIN THE MEANING OF FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 52(B), WHERE, AS HERE, THE DEFENDANT'S TESTIMONY SUPPORTS A FINDING THAT RULES FOR RECOGNIZING REVENUE WERE DIFFERENT FROM THE RULES PROMOTED BY THE GOVERNMENT, AND UNDER THE DEFENDANT'S REASONABLE INTERPRETATION OF THOSE RULES THE DEFENDANT WOULD NOT HAVE BEEN GUILTY OF FALSELY RECOGNIZING REVENUE?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BERNARD F. BRADSTREET, respectfully prays that a writ of certiorari issue to review the published opinion of a panel of the United States Court of Appeals, First Circuit, affirming his conviction and reversing his sentence and remanding for resentencing. He was convicted of violating Rule 10b-5 and sentenced to federal prison for a term of 30 months.

OPINION BELOW

The opinion of the circuit court appears in the official reports at 135 F.3d 46 and is reproduced in the Appendix at pp. App. 1. - App. 26. The order of the circuit court denying rehearing is also appended.[1] (App. 27.)

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Sec. 1254(1). The judgment of the district court was rendered on December 12, 1996. The opinion of the circuit court was filed on January 29, 1998. A petition for rehearing and suggestion for rehearing *en banc* was timely filed, and the order denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* was filed on March 17, 1998.

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[1] In the proceeding below Bernard F. Bradstreet, Petitioner herein, appeared as defendant and appellant; the United States of America appeared as plaintiff and appellee. There was a cross-appeal by the United States of the sentence which was consolidated with the defendant's appeal and this petition relates to both appeals.

This Petition is timely filed pursuant to Rule 13.4 of the Supreme Court Rules.[2]

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the due process clause of the Fifth Amendment, and the right to a jury trial contained in the Sixth Amendment to the United States Constitution, and the United States Sentencing Guidelines.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Ironically, although this petition presents one guilt related constitutional issue and one issue related to the proper role of a circuit court in reviewing a downward departure under the sentencing guidelines, to a great extent both of these issues turn on the same trial testimony - that of the defendant, Bernard F. Bradstreet.

Mr. Bradstreet was the president and chief financial officer of a computer hardware and software company, Kurzweil Applied Intelligence, Inc. ("KAI"), which pioneered voice recognition computing. He was charged with five counts of conspiracy and securities fraud. The gravamen of the government's case was the government's contention that Bradstreet approved to booking of KAI sales

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[2] The circuit court also granted Petitioner's motion to stay the mandate pending the filing of this petition which, under the rules of the first circuit, requires the Petitioner to establish probable cause for the issuance of a writ of certiorari by this Court.

which failed to meet the requirements of the company's revenue recognition policy (sometimes hereinafter, "the policy"). A revenue recognition policy is a policy which meets generally accepted accounting principles and is comprised of the criteria by which accrual basis accounting firms recognize revenue and establish reserves against potential "bad debt."

Although the government denied it in their briefs below, and the circuit court quibbled about the significance of the difference among various versions, the record clearly contains no less than six different government versions of the KAI revenue recognition policy.[3] Perhaps more significant, the defendant testified to an interpretation of the revenue recognition policy which substantially diverged from the criteria for booking a valid sale set forth in the indictment or alleged by various government witnesses. Mr. Bradstreet testified that the policy required that two questions be answered: "Are there any major uncertainties? [NO.]" and "Is collection probable? [YES.]" (App. 10).

Mr. Bradstreet also testified that the major sales questioned by the government[4] were properly booked under the policy. In explaining this opinion he emphasized that the government witnesses had oversimplified and misstated the

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[3] Although the circuit court's concession of this fact is grudging (see opinion below at App. 10.), the circuit court described the government's argument that "all witnesses' summaries of Kurzweil's revenue recognition policy were essentially consonant" was "seriously misleading." (Please see App. 9-10.)

[4] Representing the lion's share of the dollar value of the sales the government alleged to be improperly booked.

criteria contained in the revenue recognition policy.[5]

There are two ways to view Petitioner's testimony. One is to see it as his claim that the questioned sales were properly booked under any view of the policy, the other is to see it as disputing the actual requirements of the policy, with the validity of the ultimate conclusion whether the sales were properly booked depending upon which "version" or interpretation of the policy the jury accepted.

The jury convicted Bradstreet of securities fraud, in violation of rule 10b-5. There were four counts based on alleged (1) overstatement of revenues in the initial public offering ("IPO"); (2) overstatement of revenues in required 10-Q, quarterly reports; (3) either concealing the truth about the improperly booked sales, or aiding and abetting the concealment of the truth from auditors and the SEC.

For reasons which do not appear on the record of this case, the parties then entered into a sentencing agreement. Under that stipulation the parties agreed to a guideline calculation and further stipulated that the defense may seek a downward departure on the basis of aberrant conduct under the first circuit case governing such departures, *United States* v. *Grandmaison*, 77 F.3d 555 (1st Cir. 1996).

The district court did depart downward to 33 months and based its decision on a careful review of its conclusions from the trial and the sentencing materials presented by the parties. The government argued that this conviction could not constitute a "single act of aberrant" conduct because: (1)

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[5] The chief government witness in the case was Bradstreet's vice president who received consideration from the government in return for her guilty plea and testimony against Bradstreet.

there were multiple counts of conviction, not just one; (2) there were two phases of the charged crimes, the initial misrepresentation of the revenue, and the cover-up; and (3) the defendant's trial testimony was obviously perjury, so *that* constituted a separate criminal act depriving the crimes of conviction of their character as "aberrant." The district court rejected this contention and viewed the totality of the circumstances and concluded that a departure was appropriate. The district court cited this Court's recent decision in *Koon* v. *United States*, 518 U.S. 81 (1996), as well as the First Circuit *Grandmaison* decision. The district court did not specifically address the government's argument that the defendant's testimony was perjury, although the government's sentencing stipulation precluded it from arguing that the guideline calculation should include an upward adjustment for obstruction of justice under U.S.S.G. § 3C1.1 based on an argument that the defendant committed perjury.

On appeal the defendant argued that the district court committed plain error by failing to correctly instruct the jury on the elements of the crime in the circumstances of this case. This contention was based on the fact that the government's theory of fraud was, essentially, that the defendant made false statements concerning KAI revenues by "booking" sales which were not proper to book under the revenue recognition policy. That policy constitutes a set of rules for making statements required by law in the IPO and 10-Q reports. But where, as here, there is a dispute as to the precise interpretation or meaning of such rules, the statements made are not "false" unless the government proves that there is no reasonable interpretation of the policy which would render the statements made true.

This principle of law had been recognized in several circuits prior to this trial (see e.g., *United States* v. *Migliaccio*, 34 F.3d 1517 (10th Cir. 1994); *United States* v. *Anderson*, 579 F.2d 455, 460 (8th Cir. 1978), cert. den. 439 U.S. 980, 99 S.Ct. 567, 58 L.Ed. 651 (1978); *United States* v. *Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) (adopting *Anderson* to hold that one cannot be found guilty when his statement is a reasonable construction); *United States* v. *Dale*, 991 F.2d 819, 832-33 (D.C. Cir. 1993).

The circuit court embraced the rule of law relied upon by the defense as correct (App. 11-12), but rejected the plain error contention here by contorting its own prior description of the record and concluding that indeed there really was no dispute between the prosecution and defense over the meaning or interpretation of the policy. (App. 12-13)

The government appealed from the downward departure arguing that, as a matter of law, this was not a case of aberrant conduct, asking the circuit court to interpret its prior decision in *Grandmaison* to the facts of this case and conclude that only a single crime would qualify. The government also repeated its perjury claim.

Defendant countered by relying on this Court's decision in *Koon* and its First Circuit ancestor, *United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993) as precluding the circuit courts from making or creating new rules of sentencing law applying to departures.

Despite what Petitioner understands to be a strong, unequivocal prohibition against circuit court made departure sentencing rules, the court below reversed the downward departure stating:

> "[As a matter of law] * * * one convicted of criminal dishonesty is ... not entitled to an aberrant conduct departure if he has testified dishonestly about his criminal conduct ." App. 22-23.

SUMMARY OF ARGUMENT

Petitioner seeks this Court's writ and reversal of the circuit court on both issues.[6]

This Court should grant certiorari to clarify the holding of *Koon* v. *United States* on the question of the "rule-making" role of the circuit courts in the area of departures under the United States Sentencing Guidelines.

By any reckoning the downward departure in this case was within the discretion of the district court under both *Koon* and the prevailing and relevant circuit authorities, *Grandmaison* and *Rivera* (specifically approved in *Koon*).

Nonetheless, the circuit court here took two steps which merit this Court's intervention and correction: (1) It announced a departure rule, stating that "as a matter of law" the district court cannot depart downward based on aberrant conduct if a defendant convicted of a crime of dishonesty (fraud) also testifies falsely in defending himself on that charge; (2) It applied that [newly created] rule retroactively to this case.

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[6] Other issues were raised below but they do not share the widespread importance of these two issues. Rather, their rejection by the circuit court worked a singular injustice in Petitioner's case alone.

It was clear that the *Grandmaison* case had not previously held what the circuit court held here and that the case below would become a new rule of law within the First circuit on the contours of permissible "aberrant conduct" departures. It is probable that the opinion below was published to announce this new rule of sentencing law.[7]

Since Petitioner understands *both* this Court's holding in *Koon* and the first circuit's en banc holding in *Rivera*, *supra*, to prohibit the making of precisely this type of court-made departure rules, this case is appropriate for review and correction by this Court.[8]

Petitioner contends that where, as here, there is nothing in any statute or Guideline provision which precludes a downward departure under the totality of the circumstances of the case which, in the main, disclose a defendant who has lived what the district court here found to be an otherwise "commendable life", and where the crime is clearly outside the heartland because it was a conviction for fraud found by the district court *not* to be committed for personal gain or out of greed and was a first-ever prosecution of its type,[9] the circuit court could not lawfully have created a rule of law precluding departure in this case.

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[7] And to announce that the first circuit joined several other circuits in adopting the rule of *United States* v. *Anderson*, *supra*, and *United States* v. *Migliaccio*, *supra*.

[8] Petitioner's petition for rehearing and suggestion for rehearing *en banc* was denied.

[9] I.e., the first Rule 10b-5 *criminal* fraud case prosecuted to verdict based on alleged overstatement of revenues in an IPO.

In addition, the practice by circuit courts of engaging in rule-making on review of departures raises an issue presented to the circuit court on rehearing, but not commented upon -- whether the application of such a new rule to the case *sub judice* runs afoul of this Court's due process holdings in *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977) and *United States* v. *Lanier* - U.S. -, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997).

Certiorari should also be granted here to establish the rule that whenever a court makes a new rule which precludes an otherwise allowable lower sentence, that rule may only be applied prospectively to avoid ex post facto, due process objections.

Finally, the circuit court's own concessions about the trial evidence, including Mr. Bradstreet's testimony, show that: (1) several substantively different versions of the KAI revenue recognition policy were given to the jury in the indictment and by government witnesses; (2) Mr. Bradstreet sharply disputed the government's interpretation or version of that policy; (3) under his version of the policy, which a jury could conclude was both reasonable and accurate, his decision to book the disputed sales would be permissible.

The record also shows that the jury was never informed that *it* must determine whether the government's interpretation of the revenue recognition policy was correct.

But most significantly, the jury was never instructed that if there was any reasonable interpretation of that policy which would make it permissible to book the disputed sales, the decision to do so could not support a fraud conviction.

While the plain error test enunciated and recently re-enforced by this Court is a narrow test, this is one case in which the straightforward application of that or any test should yield the conclusion that the failure of the trial court to instruct the jury on one of the elements of the crime charged, i.e., the government's burden to eliminate any reasonable interpretation of the policy which would make the alleged false statements true, was both plain error, and prejudicial constitutional error requiring reversal.

Regardless of the outcome of any plain error analysis, it is clear that in this case the defense *both* disputed the factual nature of the case *and* disputed the meaning or requirements of KAI's revenue recognition policy. There is a real possibility that the jury could have accepted Mr. Bradstreet's testimony in large part, i.e., that he booked the sales because he thought (1) there were no major uncertainties; and (2) collection was probable, but still convicted defendant because they believed he was falsely booking the sales under one of the other versions of the policy which the government offered in evidence.

Contrary to the government's argument and the circuit court's conclusion (App. 23-24) that the jury *necessarily* found Mr. Bradstreet booked the sales with the intent to defraud[10] the jury's finding on intent was inextricably bound up with what the jury thought the policy required. If Mr. Bradstreet's testimony was understood to mean that he intentionally booked sales which contained features which would violate the government's version or interpretation of that policy, they could convict without

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[10] Manifestly this was not an explicit finding of the jury, nor did the district court (apparently) accept the government's argument to this effect at the time of sentencing.

believing that he intentionally violated what he believed the policy called for. But the failure of the court to instruct the jury that they were the arbiters of what the policy meant, and that if they found there was any reasonable interpretation of the policy which rendered the sales properly booked there was no false statement made in booking the sales, the jury would clearly have approached the intent issue from a different point of view, and would likely have reached a different conclusion.

For this reason, the circuit court was wrong in rejecting petitioner's plain error argument, and in error in concluding (contrary to the district court's implied finding in support of his downward departure) that Mr. Bradstreet was guilty of perjury at the trial.

REASONS FOR GRANTING THE WRIT

The First Circuit's conclusion that the sentencing judge erred as a matter of law in finding the defendant was entitled to a downward departure on the basis of the aberrant behavior concept because the reviewing court also found that Petitioner's trial testimony was perjury conflicts with this Court's holding in *Koon* v. *United States*, 518 U.S. 81 (1996).

In reviewing a district court decision to depart (up or down) from the Guidelines sentence, the appellate court should not review the decision *de novo* but should ask whether the sentencing court abused its discretion, giving

"due deference to the district court's application of the guidelines to the facts." *Koon* v. *United States*, 518 U.S. 81, 116 S.Ct. 2035, 135 L.Ed.2d 392, 409, 412 (1996); 18 U.S.C. § 3742; and see *Williams* v. *United States*, 503 U.S. 193, 117 L.Ed.2d 341, 112 S.Ct. 1112 (1992)[11] "Because the sentencing court enjoys a unique vantage point and has 'special competence' in assessing the 'ordinariness' of a case, we afford it substantial deference in departure decisions, which we review only for abuse of discretion. (citing *Koon*, *supra*)" *United States* v. *Hardy*, - F.3d - (1st Cir. 1996).

In *Koon* v. *United States*, *supra*, the government argued that the district court erred as a matter of law in finding facts supporting a downward departure for victim provocation, citing to government evidence and the general verdict of guilty. This Court rejected this objection and found that the district court properly found mitigating facts. (*Koon*, *supra*, 135 L.Ed.2d at pp. 416-417.)

The district court here based its decision to depart downward on several factors, prominent among them numerous letters.

> "Were it not for the convictions in this case, both of these men would be exemplars of the best that the American experience has to offer. Both men made themselves

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[11] "The development of the guideline sentencing regime has not changed our view that, except to the extent specifically directed by statute, 'it is not the role of an appellate court to substitute its judgment for that of the sentencing court as to the appropriateness of a particular sentence.'" (quoting *Williams*, 503 U.S. at 205, 117 L.Ed.2d 341, 112 S.Ct. 1112, quoting *Solem* v. *Helm*, 463 U.S. 277, 290 n. 16, 77 L.Ed.2d 637, 103 S.Ct. 3001 (1983)). *Koon*, 135 L.Ed.2d at 412.

successes in the most admirable sense of the word.

"Mr. Bradstreet -- these are things I learned from the presentence report and the letters that I read -- left fatherless at age four, a scholarship student at Harvard, a Marine fighter pilot, married for 30 years to a devoted wife, with three successful and loving children; a man who has inspired friendship and admiration from most of those whose lives he has touched.

"Let me say, too, about the letters that I received on behalf of both Mr. Bradstreet and Mr. Campbell, as a judge you become inured to letter-writing campaigns. I have received thousands of them with respect to sentencing. I will say that these are not the usual letters that I receive. I do not think there is one that I read that does not include, as opposed to the stereotypical letter I am familiar with, some telling personal vignette about each of these mens' lives and the way they (sic) the lives of those around them." (RT, 12/28/96, p. 32, ln. 21 - p. 33, ln. 16).

While the circuit court acknowledged that *Koon* v. *United States*, *supra*, is controlling, it apparently believes that decision was limited to stating that review of departure is for an abuse of discretion. (App. 24)

This analysis ignores the fact that in *Koon*, this Court quoted the four questions from the First Circuit decision in *United States* v. *Rivera*, *supra*, 994 F.2d 942, 949 and went on to say, "We agree with this summary." It then restated the process which the district court must follow, and *then*

wrote:

> "District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do." *Koon,* 135 L.Ed.2d at 413.

The court below attempted to portray the district court's basis for departure as an error of law by describing it in at a "higher level of generality" than is proper.

In *Koon*, this Court also noted:

> "The government seeks to avoid the factual nature of the departure inquiry by describing it at a higher level of generality linked closely with questions of law. The relevant question, however, is not, as the government says, 'whether a particular factor is within the heartland,' as a general proposition, . . . but whether the particular factor is within the heartland given all the facts of the case. . . . The answer is apt to vary depending on, [case-specific circumstances.] These considerations are factual in nature." (*Koon*, 135 L.Ed.2d at p. 414).

Lest there be any doubt that the district court's decision to depart in *this* case was factual, the record below makes it clear that it was. In fact, when the district the court gave its reasons for the downward departure, it found both that the case is outside the heartland, i.e., the

defendant's conduct is atypical because (a) the government has admitted as much[12]; (b) the crime is out of the heartland due to the lack of being driven by personal greed[13]; and finally, (c) Mr. Bradstreet, (who is in his 50's) has not only lived an otherwise blameless, law abiding life, but has lived an exemplary one.[14]

In support of these more general findings, the district court gave specific reasons, based on its own hearing of the evidence, for these conclusions.

The court first noted the defendants "have been ruined financially, or nearly ruined, by the obligations they incurred by defending this case." (RT, 12/28/96, p, 35).

Next the court noted that "the essential misrepresentation in this case, . . . was confined to one, albeit material, issue, that is, the actual profitability of Kurzweil at the time the IPO was marketed." This finding is significant in light of the district court's next finding, that the:

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[12] RT, 12/28/96, p. 31, ln. 23 - p. 32, ln. 3.

[13] RT, 12/28/96, p. 32, 13-18. ["What also makes this case different from the usual securities fraud case is the fact that the defendants, by the evidence I heard, were not, as is typically true, driven by personal greed but rather by a misguided dedication to the institutional interests, at least as Mr. Bradstreet perceived them, of the company for which he worked...."]

[14] Please see excerpt of the sentencing transcript quoted above, RT, 12/28/96, p. 32, ln. 21 - p. 33, ln. 16, *and* p. 33, ln. 24 - p. 34, ln. 2. ["As was pointed out in the letters and submissions by counsel, both men have contributed to the charitable and civic life of their communities in a measure beyond what I would consider *pro forma* in nature."]

> "prospectus did not conceal the fact that Kurzweil was a highly speculative venture, marginally capitalized in a market where it faced formidable competition, and the Kurzweil's success was ultimately dependent upon the technical superiority of its product and not upon the immediate financials of the company itself. Even a moderately sophisticated investor, I believe, would have recognized, even if misled about the profit figures, that Kurzweil was a high risk proposition, and this was a fact that the prospectus did not conceal." (RT, 12/28/96, pp. 35-36).

This finding was supported by the IPO itself to which the judge referred, and to Mr. Bradstreet's testimony that the profitability of the company was not the *sine quo non* of the success or failure of the IPO. (RT, 15:17-18)

After repeating that he found that this crime was committed because "these men, choose to subordinate their judgment and integrity to their misconceptions of the interests of the companies they serve" the judge concluded that he believed that a life otherwise worth having been lived and "otherwise worthy of commendation" should count for something, "some departure is warranted."

The Circuit court found the district court's departure decision was erroneous as a matter of law because *Grandmaison*, its own pre-*Koon* precedent, sets forth a definition of the term "single act of aberrant behavior" which is narrower than the district court's use of that term, and which it held for the very first time was inconsistent with any defendant's false testimony at trial.

After *Koon*, there is no longer any special talismanic significance to be placed upon the phrase "single act of aberrant behavior." Rather, this Court made it abundantly clear that where, as here, the factors considered by the district court are not prohibited, there is "no limitation" on the factors that a district court may consider to be mitigating to support a downward departure in the circumstances of a particular case.[15]

Moreover, any focus on the *number* of crimes is little more than a shell game variation on its former (rejected) focus on the "number" of acts. The Guidelines noted that *the government* is in control of the *number* and nature of the crimes to be charged. It wrote:

> "The Commission recognized that a charge offense system has drawbacks of its own. One of the most important is the potential it affords prosecutors to influence sentences by increasing or decreasing the number of counts in an indictment. * * * Furthermore, a sentencing court may control any inappropriate manipulation of the indictment through the use of its departure power." (U.S.S.G., Ch. 1, Pt. A., 4. *The Guidelines' Resolution of Major Issues (Policy Statement)*, last full ¶.)

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[15] For this reason, it is legally irrelevant that many other circuits, in pre-*Koon* cases, held this basis for departure was limited to cases in which there was a single, impulsive or spontaneous or thoughtless act. There is no longer any justification for a court to "define" what might, in the abstract, constitute "a single act" of aberrant behavior, since the underlying facts of a case might still justify departure even if the case did not involve a "single act."

In this case the government took advantage of the alleged seamless nature of the overall "scheme" the defendant allegedly participated in to obtain and defend his conviction, but in attacking the sentence conveniently seeks to use the "number of counts" *it has placed into the indictment* as a legal reason for reversing the district court's finding that there was a "series of acts leading to the commission of one fundamental crime." Under *both* this Court's decision in *Koon*, and the above quoted United States Sentencing Commissions Guidelines policy statement, the district court was justified in departing downward on the basis of its supported factual finding and conclusion that the defendant's behavior here (as found by the court) was animated by a single objective, "the success of the Kurzweil IPO."

The opinion below never mentioned the fact that this is the first ever criminal conviction under Rule 10b-5 on the theory that there was a fraudulent overstatement of income in an IPO, or 10-Qs, filed with the SEC by a company going public. The opinion also overlooks the fact that the trial judge quoted the government itself as having conceded this was a novel prosecution for that precise reason in the district court.[16]

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[16] Please see RT, 12/12/96, p. 31, ln. 25 - p. 32, ln. 3:

"That this is not a typical case, the Assistant United States Attorneys themselves have attested by pointing out that this is the first successful federal prosecution of its kind under the securities laws." In these remarks, the trial Judge, the Honorable Richard G. Stearns, went on to note this was "a factually difficult and legally complex case."

In *Koon* v. *United States*, *supra*, this Court made clear that the district court's downward departure discretion is not governed by rules of law which make certain fact patterns legally eligible and others legally ineligible for departure, but a district court's decision involves the consideration of factors that are little susceptible... of useful generalizations... and as a consequence, *de novo*, review is unlikely to establish clear guidelines for lower courts. (135 L.Ed.2d at p. 414).

Moreover, the Court's adoption of Justice Breyer's four questions [from the en banc decision in *United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)], leave absolutely clear that a district judge does not make an error of law in departing downward unless the factor upon which he relies to take the case outside of the heartland is a basis on which the Congress or the United States Sentencing Commission has forbidden as a basis of departure.

Suffice it to say that a "*single act* of aberrant behavior" is not found as verbal formula for determining whether aberrant conduct not reduced to a single act is "forbidden" as a basis for departure in any act of congress, or in any statement of the commission. In fact, the phrase "single act of aberrant behavior" is most akin to an "encouraged" basis for departure, but *Koon* makes it clear that a basis need not be encouraged to be a lawful basis for downward departure.

Based on the overall analysis of departure in *Koon*, this Court should grant review and hold that the circuit court's 'as a matter of law' rule that a defendant which the circuit court finds lied in his testimony about a charge of criminal dishonesty is never eligible for an aberrant conduct downward departure is an impermissible court-made rule.

Clearly, here, looking at the "totality of the circumstances" and guided by this Court's decision in *Koon*, *supra*, the district judge who viewed defendant's involvement in this case, from the beginning to the end of the trial, as aberrant in the context of his over 50 years of exemplary living did not abuse his discretion in finding it to warrant a downward departure on the basis of aberrant conduct. That basis for downward departure is "forbidden" nowhere either in a statute or the Guidelines, or other language of the commission. Under *Koon*, then, as a matter of law, the circuit court's conclusion is erroneous and should be reversed.

> **Applying a "new" court-made rule to the case in which the rule is announced violates the due process equivalent of the *ex post facto* rule, recognized by this Court in *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977) and *United States* v. *Lanier*, - U.S. -, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432 (1997)**

Since the rule of sentencing law announced in this decision was not anywhere to be found prior to the filing of this opinion, application of this new harsher rule to this case violated the constitutional principle prohibiting *ex post facto* laws. (See e.g., *United States* v. *Kopshever*, 6 F.3d 1218 (7th Cir. 1993) [*Ex Post Facto* attack on sentence may be raised on appeal even if not mentioned in the district court.][17]

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[17] By a parody of reasoning, where, as here, the *circuit* court establishes a new rule of sentencing law for the first time in reversing a favorable (or lower) sentence, that issue should be raisable on petition for rehearing or certiorari, as petitioner has raised it here. The issue was

Just as the *ex post facto* provision of the Constitution prohibits the legislative branch from enacting laws that impose criminal penalties for past conduct (U.S. Const., art. I, §§ 9, 10), so also the constitutional due process guarantees (U.S. Const., 5th and 14th Amends.) prohibit the judicial branch from imposing unexpected criminal penalties by construing existing laws in a manner that the accused would not have foreseen at the time of the alleged criminal conduct. *Marks* v. *United States*, 430 U.S. 188, 191-192, 97 S.Ct. 990, 992-993, 51 L.Ed.2d 260 (1977) A court violates this due process "fair warning requirement" when it applies "a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." (*United States* v. *Lanier* (1997) - U.S. -, 117 S.Ct. 1219, 1225, 137 L.Ed.2d 432.).

Applying that reasoning to this case it is clear that the no prior decision of this or any circuit court held that perceived (by the reviewing court) perjury precluded a downward departure as a matter of law. Certainly there was no prior First circuit decision to this effect and there is nothing in the Guidelines to suggest this is the case.

Nevertheless, despite the fact the government made the perjury argument in the district court and the departure was still granted, the circuit court first announced its new rule of downward departure in this case, and then applied it retroactively to this case to reverse the downward departure.

Presumably, if this had been the rule of the First circuit at the time of the sentencing stipulation below, the defendant would never have entered into it, but would have sought an agreement that would have allowed him to seek

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included in the rehearing petition as well as this petition.

downward departure on other bases, nor foreclosed by alleged trial perjury. Of course since there was no such rule at the time of sentencing below, the defendant had no warning that this *could* be a result on the government's appeal from the district court's downward departure. Certiorari should be granted on *this* ground alone.

A district court commits "plain error" within the meaning of Rule 52(b) where the defendant's testimony supports a finding that rules for recognizing revenue were different from the rules promoted by the government, and under the defendant's reasonable interpretation of those rules the defendant would not have been guilty

In its opinion below, the First Circuit expressed its general agreement with the holding of several other circuits, exemplified by the decision in *United States* v. *Migliaccio*, 34 F.3d 1517 (10th Cir. 1994) that in a fraud case, the jury must be instructed that "where the defendant advances an understanding of the principles by which truth and falsity are judged that differs from that of the government; and where the defendant's actions might have been truthful under such an understanding, the government cannot carry its burden without first demonstrating the unreasonableness of the contrary understanding." (App. 12, citing to *Migliaccio*, 34 F.3d at 1522-25.)

Despite recognition of the correctness of this rule of law the panel found failure to give such an instruction here was not plain error because it concluded defendant never, in testimony or argument, contended that his underlying understanding of the KAI revenue recognition policy differed from that of the government. App. 12.

Contrary to this characterization of the record, the defendant here did, in testimony, clearly claim that the revenue recognition was not found in the short "memorandum" the government said it was in, but in fact was "a pamphlet ... a quarter of an inch [thick]." (RT, 5/6/96, p. 50, ln. 21- p. 51, ln.4). And he further testified that the "real test is" "are there any major uncertainties and is collection probable." (RT, 6/5/96, p. 51, lns. 7-8) This was a marked difference from the test set forth in the Indictment [that KAI "had a firm, unconditional contract with the buy evidenced by a signed purchase order or sales quote signed by the customer" and "it had shipped the product to the customer." *Indictment*, ¶2.f.], or the government's evidence at trial.

The opinion tacitly admits as much in condemning the government's contention that "Bradstreet presented as his defense theory lack of knowledge of the fraud, not truth-in-conduct" as "misleading." Indeed, as the panel opinion states:

> "Bradstreet ... did defend on the basis that the revenue that these transactions would have generated was properly recognized under Kurzweil's policy." (App. 10).

On the record in this case, the conclusion of the panel that "Bradstreet never affirmatively claimed, either in testimony or in argument, that his underlying understanding of Kurzweil's policy differed from that of ... [two of the government's more important witnesses]" (App. 12) cannot be squared with the clear import of his testimony, where he both admitted that there were side deals, and contingencies beyond the control of Kurzweil, but still maintained booking such sales was permitted under the revenue recognition

policy because he honestly judged the sales to be solid and free of any major uncertainties.

The remaining discussion of this issue is an example of the panel substituting its judgment of the facts of the case based on the evidence for that which a properly instructed jury should have been allowed to exercise. Thus, the opinion goes on to state that *it* does "not take it [defendant's testimony] to be a *de facto* assertion that Bradstreet's baseline understanding of the policy differed from that of the government, or that a contrary understanding was possible." (App. 12)

Of course what is legally important is how the jury could reasonably have taken the defendant's testimony, not how the reviewing court does.

The first clause in the above quoted sentence is nothing more than engaging in the drawing of factual conclusions from ambiguous evidence. The second is, plainly, an unsupported conclusion. To determine that a "contrary understanding was [not] possible" based on Bradstreet's testimony is a bald usurpation of the jury's function.

This usurpation was, however, logically necessary to justify the ultimate rejection of the argument that the failure to give the "reasonable interpretation" instruction was not plain error in this case.

Since the Court properly rejected the government's "seriously misleading" suggestion that Mr. Bradstreet did not defend on the basis of his view that, under the policy,

booking the contested sales was proper[18] and further conceded that differing versions of, and interpretations of, the KAI revenue recognition policy were found even in the government's evidence, let alone the divergence between the government's various incarnations of the policy and the defendant's testimony, it could only base a conclusion that the failure of the court to instruct in the way argued for by Petitioner was not plain error on its further, unwarranted conclusion that "[the panel][19] does not take it [defendant's testimony] ... that a contrary understanding [of the revenue recognition policy] was possible.

At one point in the opinion below the government's version of the policy is gleaned from an exhibit (a memorandum circulated to the KAI sales staff). The "memorandum reminding the staff of Kurzweil's 'policies regarding shipment and revenue recognition' ... stated that anticipated revenue should not be recognized if 'major uncertainties ... surround culmination of the [revenue-generating] transaction' or if 'final acceptance by the customer requires an event out of [Kurzweil's] control...'" (App. 4). The claim that this was the actual policy was directly contradicted by Bradstreet in his testimony, where he explained that in that memorandum, "what we try to do is make the decision as simple as possible for the salespeople." He had *just* testified, however, that the actual policy rules "are quite complex" and he followed the reference to the simple rules in the memo with the above quoted testimony that the real pamphlet was a quarter inch thick. The rules are not "nice, simple, black and white" but

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[18] Except for those he thought were bona fide, which were, in fact, forged, of which testified he had no knowledge.

[19] The opinion used the term, "[illegible]". App. 12.

are complex.

Not only was a "contrary [to the government's] understanding" [of the policy] *possible*, such was the only possible interpretation of the defendant's testimony to the effect that despite a side deal, or "contingency" not within KAI's control, in Petitioner's judgment, it was proper to book the Transquick sale. (In that case the government argued that the OEM agreement was a contingency that made booking the sale violative of the policy, but Bradstreet testified *without contesting the existence of the contingency, i.e., the OEM agreement*, that it was not a "major uncertainty" which made the sale unbookable.

This testimony, repeated in substance as to several other specific sales, and supported by general claims that the sales were all properly booked, based on the information Petitioner had at the time, shows that it was not "hotly contested facts" which resulted in the dispute between the government and the defendant, but widely divergent interpretations of the revenue recognition policy and its application to undisputed facts, vis. the existence of contingencies not in KAI's control.

Petitioner similarly testified as to several other sales which had similar contingencies that, contrary to the government's view, such contingencies did not take a sale outside of the revenue recognition policy, so long as, in his sound judgment, the customer was likely to pay.

This is a clearly "contrary understanding" of the policy itself, and in the absence of the "reasonable interpretation" instruction, there is grave doubt whether the jury understood that it, not the government, was to determine which meaning of the policy was reasonable and,

therefore, whether or not the statements in the SEC filings that revenue was "due" were true.

The panel relied on Rule 52(b) to affirm in the face of Petitioner's argument and despite its general acceptance of the principle gleaned from *Migliaccio*.

Petitioner urges this Court to find that where, as here, there is a reasonable probability that the jury would interpret or understand the law in a way to permit it to convict without finding each element of the crime true, [i.e., in an unconstitutional way], the error requires reversal regardless of an objection or a request that the court properly instruct the jury. *Estelle* v. *McGuire*, - U.S. -, 116 L.Ed.2d 385 (1991); *Cupp* v. *Naughton*, 414 U.S. 141, 147, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973); *Sandstrom* v. *Montana*, 442 U.S. 510 (1979).

The circuit court's recognition of Petitioner's testimony mentioned above is tantamount to admitting that Bradstreet's testimony did, in fact, contest the government's interpretation of the policy itself, because nowhere did Bradstreet deny that there were "side agreements" or that they were "conditioned ... on the occurrence of some event not within Kurzweil's control..." as argued by the government. (App. 5).

Indeed, as pointed out in his briefs below, Petitioner testified that despite the existence of such side agreements, or such conditions, *booking a sale was a matter of exercising a complex judgment about whether or not there were any "major uncertainties" and that he was required to exercise that complex judgment in each case.*

He further testified that the memo circulated to the salespeople was not intended to state absolute conditions, but to describe the thrust of the revenue recognition policy in terms its salespeople could understand. The 7/28/87 document referred to in the opinion (App. 4) titled "revenue recognition policy" was drafted by the government's cooperating witness, vice president Deb Murray, and it was not a complete and accurate statement of hard and fast rules which governed his (Petitioner's) exercise of judgment in determining whether to book a sale.

Nor is this a case of overwhelming evidence of guilt. As the panel below recognized, in *Johnson* v. *United States*, 117 S.Ct. 1533, 1549-1550 (1997), this Court "has declined to exercise its discretion [to reverse under Rule 52(b)] in the face of 'overwhelming evidence that the outcome would have been the same in an error-free proceeding.'..." It went on to state:

> We evaluate Bradstreet's first four appellate arguments against this unfriendly legal backdrop." App. 7.

Although the opinion said it was going to do this, it never concluded the case against Bradstreet was particularly strong, and such a conclusion would be contrary to the record. Moreover, its conclusion that the proper instruction would not have changed the jury's verdict is flawed in two ways: (1) *it* depends on an improper assumption that the jury understood petitioner's testimony the same way the panel said *it* did, and (2) it assumes that to reverse, the reviewing court must find the result would actually have been different, which petitioner understands to be contrary to the test in light of *Kyles* v. *Whitley*, 514 U.S. 419, 131 L.Ed.2d 490, 115 S.Ct. 1555 (1995).

There, this Court wrote:

> "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.' *Bagley*, 473 U.S., at 678, 105 S.Ct., at 3381." *Id.*, at 434.

In the same place, this Court in *Kyles* said:

> "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*, at p. 435.

On this reasoning, an error in failing to require the government to prove the defendant's allegedly fraudulent statements were false under every reasonable interpretation of the rules for making such statements "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." For the same reason this case is important to any future criminal prosecutions for Rule 10b-5 fraud in public offerings.

Given the unique nature of this first ever 10b-5 criminal case in the context of an initial public offering or related SEC filings, the Court is urged to grant certiorari holding there was no plain error.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the circuit court affirming Petitioner's conviction, and/or reverse the judgment of the circuit court *reversing* the district court's downward departure.

WHEREFORE, Petitioner prays that this Honorable Court grant this Petition and issue its Writ of Certiorari.

Respectfully submitted this 13th day of April, 1998

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